Petition

No. 81-218

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IN THE

Supreme Court of the United States

October Term, 1981

CHRYSLER CORPORATION,

Petitioner,

vs.

FEDDERS CORPORATION, FEDDERS INTERNATIONAL CORPORATION, AIRTEMP CORPORATION, AIRTEMP INTERNATIONAL CORPORATION and FEDDERS WORLD TRADE CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT EHRENBARD
350 Park Avenue
New York, New York 10022
(212) 752-5800

Counsel for Petitioner

Questions Presented for Review

1. Is the analysis of the proof required to establish "antitrust injury" under Section 7 of the Clayton Act as set forth in this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), applicable at the pleading stage of a claim for relief based upon a violation of Section 1 of the Sherman Act?

2. Does this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), overrule settled law and hold that a person's business which is destroyed by the means used to accomplish a violation of Section 1 of the Sherman Act suffered no "antitrust injury" because that person is no longer in the market when the anticompetitive ends are achieved?

3. Does this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), require that only traditional and previously recognized means of violation of the antitrust laws can give rise to "antitrust injury" such that new and novel anticompetitive schemes or acts are now effectively beyond the coverage of the antitrust laws?

List of Parties and Listing Pursuant to Rule 28.1

All parties to the proceeding in the court whose judgment is sought to be reviewed were:

Chrysler Corporation,*

Plaintiff-Appellant,

and

Fedders Corporation,
Fedders International Corporation,
Airtemp Corporation,
Airtemp International Corporation,
Fedders World Trade Corporation, and
Interclisa, S.A.,

Defendants-Appellees.

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* Chrysler Corporation subsidiaries (except wholly-owned subsidiaries) are Chrysler de Mexico, S.A., Aire y Temperatura S.A., Chrysler Life Insurance Company of Canada, and Chrysler Comercial S.A. de C.V. Chrysler Corporation is affiliated with Chrysler Training Corporation, Chrysler Corporation Fund, and Chrysler Institute of Engineering (non-profit corporations). Chrysler Corporation has interests in numerous domestic and foreign retail sales outlets. Chrysler Corporation holds minority common stock interests in Peugeot S.A., Mitsubishi Motors Corporation, Motores Perkins S.A., and Sigma Motors Corporation (Pty.) Ltd. Chrysler Corporation holds 100% of the Series B preferred stock of Fedders Corporation.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Reference to the Opinion Below

The opinion of the United States Court of Appeals for the Sixth Circuit is officially reported at 643 F.2d 1229 and is unofficially reported at 1981-1 Trade Cas. ¶63,886.

Statement of Grounds of Jurisdiction

(i) The judgment sought to be reviewed was entered on March 18, 1981;

(ii) The court below denied rehearing by order dated May 6, 1981;

(iii) Not Applicable;

(iv) This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. §1254(1) (1976).

Statutes Involved

Section 1 of the Sherman Act, as amended (26 Stat 209, 50 Stat 693, 69 Stat 282, 88 Stat 1708, 89 Stat 801), 15 U.S.C. §1 (1976), provides:

> §1. Trusts, etc., in restraint of trade illegal; penalty
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act (38 Stat 731), 15 U.S.C. §15 (1976) provided at the times this action was brought and the appeal below heard:

§15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 4 of the Clayton Act was amended on September 12, 1980 by Public Law 96-349, §4(a)(1), 94 Stat 1156, to provide (15 U.S.C. Annot. §15 (1980-81 pocket supp.)):

§15. Suits by persons injured; amount of recovery; prejudgment interest

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted

claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

Statement of the Case

A. The Allegations of the Complaint and Basis for Federal Jurisdiction

Petitioner Chrysler Corporation ("Chrysler") sued the respondents alleging that the respondents had violated Section 1 of the Sherman Act, 15 U.S.C. §1, by conspiring to restrain interstate and foreign trade in the non-automotive air conditioning market (the "Market"), to lessen and eliminate competition, to tamper with and manipulate the Market, and to interfere with the free play of market forces. The District Court's jurisdiction was based upon Section 4 of the Clayton Act, 15 U.S.C. §15, 28 U.S.C. §1337, and over various state law claims based upon pendent jurisdiction.

Each of the respondents is engaged in the business either of manufacturing, distributing, or servicing non-automotive air conditioning products, or all of the three,

and collectively constitute a substantial factor in the Market (Com. ¶¶14-20).*

Prior to February 23, 1976, Chrysler's Airtemp Division ("Airtemp"), including its foreign subsidiaries, was a substantial factor in the Market in competition with the respondents (Com. ¶¶21-23). Subsequent to February 23, 1976 the foreign subsidiaries continued to be in competition with some of the respondents (Com. ¶23).

On February 23, 1976, Chrysler entered into an agreement (CAA 63-192) with Fedders to sell most of the assets and operations of Airtemp to Fedders (Com. ¶23). Fedders ultimately acquired the assets and operations of Airtemp but due to unlawful and fraudulent acts never paid more than a minimal amount therefor and never paid Chrysler the consideration it was obligated to pay under the purchase agreement (Com. ¶¶26(a), 26(f), 26(h), 26(j), 26(k), 27(l), 27(m), 27(n), and 27(o)). In addition, Fedders unlawfully and fraudulently procured a restrictive covenant from Chrysler to the effect that Chrysler would not engage in the non-automotive air conditioning business for five years (Com. ¶26(l)).

The complaint alleges a conspiracy by respondents to unreasonably restrain trade and unlawfully lessen competition in violation of Section 1 of the Sherman Act by destroy-

* The abbreviation "Com." refers to Chrysler's Complaint which is set forth at pages A7-A61 of the Joint Appendix in the Court of Appeals. The petitioners in No. 80-2222 have requested the certification and transmittal of the Joint Appendix pursuant to Rules 19.1 and 19.2 of the Rules of this Court. The abbreviation "CAA" refers to pages of the Joint Appendix in the Court of Appeals. The abbreviation "A" refers to the Appendix annexed to the Petition for Writ of Certiorari in No. 80-2222.

ing and eliminating Airtemp, including Chrysler and its subsidiaries, as competitors in the Market, by the misappropriation and looting of their assets and operations without paying anything but a small portion of the consideration, by fraudulently procuring restrictive covenants from Chrysler, and to restrain trade and unlawfully lessen competition by reducing manufacturing capacity by the misappropriation and subsequent liquidation of certain of the assets of Airtemp which they did not pay for (Com. ¶¶26-28).

B. The Decisions Below

The District Court granted respondents' motion to dismiss the complaint on the basis that Chrysler failed to allege "antitrust injury" under its interpretation of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (A20-25).

The Court of Appeals for the Sixth Circuit affirmed in part and reversed in part.* The Court held, *inter alia*, that Chrysler's allegation "that it has been eliminated from competition with the [respondents] by the virtual destruction of the Airtemp Division and its affiliated foreign subsidiaries" (A9) by the subversion of the purchase agreement does not constitute "antitrust injury" under Section 1 of the Sherman Act within the meaning of *Brunswick* (A4-10). The Court of Appeals so held even though Chrysler alleged that the very purpose and effect of respondents'

* Copies of the opinion, judgment and order of the Court of Appeals, and of the decision of the District Court, are annexed as an appendix to the Petition for Writ of Certiorari in No. 80-2222. Numbers in parentheses preceded by the letter "A" refer to the pages of that appendix.

intentional rendering of the purchase agreement a sham was for the intended purpose of restraining trade and to lessen and eliminate competition (Com. ¶¶25, 26).

The Court of Appeals also concluded that this Court's holding in *Brunswick* is not limited to treble damage actions for violation of Section 7 of the Clayton Act and held the analysis of "antitrust injury" set forth in *Brunswick* fully applicable to a treble damage action founded on the Sherman Act (A7) and could be applied to dismiss an action on the pleadings.

Reasons for Granting the Writ

The decision of the Court of Appeals raises important questions of federal law which should be settled by the Court without delay. The fundamental issue on this appeal —the extent, if any, to which the holding of this Court in *Brunswick* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), limiting the types of damages recoverable under Section 7 of the Clayton Act, 15 U.S.C. §18, to "antitrust injury", applies to limit claims brought under Section 1 of the Sherman Act, 15 U.S.C. §1—can only be resolved by this Court. The Court has previously granted certiorari to decide such novel and important questions in the administration of the antitrust laws. *See, Pfizer, Inc.* v. *Government of India*, 434 U.S. 308, *reh. denied*, 435 U.S. 910 (1978).

We respectfully submit that the Courts below misconstrued and misapplied this Court's holding in *Brunswick* contrary to well-established authoritative decisions by this Court interpreting Section 1 of the Sherman Act dating

back to *United States* v. *Trans-Missouri Freight Association,* 166 U.S. 290 (1897). The Court of Appeals held that under *Brunswick,* plaintiff's claim pursuant to Section 1 of the Sherman Act must be dismissed at the pleading stage for failure to allege "antitrust injury" even though the complaint clearly alleges injury to plaintiff's business and property caused by defendants' overt anticompetitive acts committed in furtherance of an anticompetitive scheme calculated to drive plaintiff from the field. In so holding, the Court of Appeals failed to discern the fundamental differences between proceedings brought under Section 7 of the Clayton Act and Section 1 of the Sherman Act; specifically that Section 7 of the Clayton Act is a prophylactic provision while Section 1 of the Sherman Act is primarily a remedial provision.

Moreover, the injury alleged in plaintiff's complaint is precisely the type of "antitrust injury" that Section 1 of the Sherman Act prohibits. The questions now presented should be decided wtihout delay because of their importance in the administration of the federal antitrust laws and because they obviously affect treble damage antitrust suits now pending in the federal courts.

I

The "antitrust injury" analysis set forth in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), is inapplicable to the pleading stage of a claim for relief based upon a violation of Section 1 of the Sherman Act.

In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), this Court held, with respect to an alleged violation of Section 7 of the Clayton Act, 15 U.S.C. §18:

> "that for plaintiffs to recover treble damages on account of §7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause' ". (429 U.S. at 489; citations omitted, emphasis in original.)

However, this Court in *Brunswick*, a case which, unlike this one, came to the Court after a full trial on the merits, specifically noted that it was concerned with reconciling the inherent tension between the anti-merger provisions of Section 7 of the Clayton Act which "proscribes mergers whose effect '*may be* substantially to lessen competition, or *to tend to* create a monopoly' " (429 U.S. at 485) (the Court's emphasis), and which is a "prophylactic measure" (*id.*), with Section 4 of the Clayton Act, which "in contrast, is in essence a remedial provision" (429 U.S. at 485). In short,

this Court was "[i]ntermeshing a statutory prohibition against acts that have a *potential* to cause certain harms with a damages action intended to remedy those harms" (429 U.S. at 486; emphasis added). This Court noted that more than a violation of Section 7 must be proved, "since such proof only establishes that injury *may* result" (429 U.S. at 486; emphasis added).

The difference between Section 7 of the Clayton Act and Section 1 of the Sherman Act in this regard is apparent. Section 7 of the Clayton Act forbids mergers which *may* produce anticompetitive effects and future injury (429 U.S. at 487), while Section 1 of the Sherman Act requires a showing of *actual* harm caused by the alleged anticompetitive acts. *Engine Specialties, Inc.* v. *Bombardier Ltd.*, 605 F.2d 1, 13 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980). Accordingly, since there may be a violation of Section 7 without any actual lessening of competition, the mere showing of a violation of Section 7, predicated as it is only on the probability that competition may be lessened, coupled with injury arising after a violation of Section 7, is insufficient to support recovery because the injury may not "have anything to do with the reason the merger was condemned" (429 U.S. 487) by the antitrust laws. Since there could be a violation of Section 7 and a resulting injury without any actual anticompetitive effect, this Court required that in seeking damages for a violation of Section 7 the plaintiff's "injury should reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation" (429 U.S. at 489).

The same considerations simply are not present in a claim for violation of Section 1 of the Sherman Act. There

is no violation of Section 1 unless and until there is an unreasonable restraint of trade and a lessening or elimination of competition. Any injury or harm which flows from a violation of Section 1 must *a fortiori* result from and reflect the anticompetitive effect of the violation. Thus any injury to business or property caused by overt anticompetitive acts violative of Section 1 must necessarily constitute an "antitrust injury" and it is necessary to establish only a violation of Section 1 and an injury which is causally linked to the acts constituting the violation. No additional "antitrust injury" is or should be required.

In addition, the Court of Appeals erroneously held the *Brunswick* analysis applicable to dismissal of a claim on the face of the pleadings. This Court in *Brunswick* directed judgment notwithstanding the verdict on the damage claim only after the plaintiffs had failed to prove, after two trials, any injury as a result of the anticompetitive nature of the defendants' acts (429 U.S. at 489-491). Petitioner should not have its claim dismissed before it has had a full and complete opportunity, including any necessary discovery, to prove injury flowing as a result of the respondents' anticompetitive acts.

There is, therefore, no warrant, on the basis of *Brunswick,* for the Courts below to have dismissed petitioner's claim at the pleading stage. The Courts below improperly read *Brunswick* as effectively changing the liberal rules adopted by this Court for the pleading of antitrust claims. The test on a motion to dismiss is whether the claim is "wholly frivolous". *Hart* v. *B.F. Keith Vaudeville Exchange,* 262 U.S. 271, 272, 274 (1923); *Radovich* v. *National Football League,* 352 U.S. 445, 453, *reh. denied,* 363 U.S. 931

(1957). It is only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" that the claim should be dismissed. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1977). "[D]ismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly". *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976). Clearly, *Brunswick* neither enunciated a modification of these well-established pleading rules nor sanctioned the Courts below to dismiss a claim on the pleadings because they doubted whether it could be proved at trial.

II

Brunswick did not change the well-settled rule that injury resulting from whatever means, however creative or novel, that are used to achieve anticompetitive ends in violation of Section 1 of the Sherman Act are compensable under Section 4 of the Clayton Act.

This case presents the important question of whether *Brunswick*, a Section 7 case, *sub silentio* overruled settled law that injury resulting from the means used to effectuate a violation of Section 1 of the Sherman Act, even though compensable under common law, constitutes "antitrust injury". Cases holding that injury resulting from the means used to accomplish an anticompetitive effect in violation of the Sherman Act are compensable under Section 4 of the Clayton Act are legion. *See, e.g., Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) (predatory pricing); *Coronado Coal Co.* v. *United Mine Workers of America*, 268 U.S. 295 (1925) (strike).

The Court of Appeals and the District Court effectively ruled that *Brunswick* completely altered the settled principles of antitrust law (A9-10; A23-25) and that one directly injured as a result of the means used to violate Section 1 may have no recourse under the antitrust laws. Their reasoning, that, under *Brunswick*, a competitor who is destroyed by the means used to achieve anticompetitive ends in violation of the Sherman Act does not suffer "antitrust injury" because that former competitor is no longer in the market when the anticompetitive effects are felt, is necessarily based on a reading of *Brunswick* to have *sub silentio* overruled a host of prior cases such as *Story Parchment Co.* v. *Paterson Parchment Paper Co., supra,* 282 U.S. 555 (1931). Under their reading of *Brunswick*, a competitor totally destroyed by predatory pricing would have suffered no "antitrust injury" because it was no longer in the market when the anticompetitive effects of the violation were felt.

Accordingly, there is clearly an urgent need for this Court to clarify the extent to which the rationale of *Brunswick* applies to violations of Section 1 of the Sherman Act. *See, Engine Specialties, Inc.* v. *Bombardier Ltd.*, 605 F.2d 1, 13 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980) (distinguishing *Brunswick* because, *inter alia*, it was a §7 case while the action at bar involved a §1 violation); *Lee-Moore Co.* v. *Union Oil Co.*, 599 F.2d 1299, 1303 (4th Cir. 1979) (rationale of *Brunswick* may not be as readily applicable in cases which charge violations of the Sherman Act); *Ohio-Sealy Mattress Manufacturing Co.* v. *Sealy, Inc.*, 585 F.2d 821, 832-833 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979).

III

Brunswick did not introduce a subjective test for courts to determine when there is "antitrust injury", and a competitor directly destroyed by means of the intentional and calculated subversion of a contract to purchase the competitor's business, when done for anticompetitive purpose and with anticompetitive effect in violation of Section 1 of the Sherman Act, has suffered "antitrust injury".

Petitioner has alleged that the respondents conspired to eliminate or lessen competition by the misappropriation and looting of petitioner's business assets and operations. The prevention of anticompetitive effects caused by the elimination or destruction of competitors is at the heart of the Sherman Act. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). A conspiracy to eliminate or destroy a competitor by any unfair means violates Section 1 of the Sherman Act. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *C. Albert Sauter Co.* v. *Richard S. Sauter Co.*, 368 F. Supp. 501 (E.D. Pa. 1973); *Perryton Wholesale, Inc.* v. *Pioneer Distributing Co. of Kansas, Inc.*, 353 F.2d 618 (10th Cir. 1965), *cert. denied*, 383 U.S. 945 (1966); *Atlantic Heel Co.* v. *Allied Heel Co.*, 284 F.2d 879 (1st Cir. 1960); *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir.), *cert. denied*, 286 U.S. 552 (1932).

Here the petitioner has alleged that the respondents intentionally engineered its elimination as a competitor by numerous anticompetitive acts. It is settled law that the "Sherman Act condemns every means, no matter how novel,

to accomplish the objective of carrying out a conspiracy to restrain or monopolize trade". *American Tobacco Co.* v. *United States,* 147 F.2d 93, 107 (6th Cir. 1944), *aff'd,* 328 U.S. 781 (1946). Part of the means used by respondents to attain anticompetitive results was the calculated inducement of petitioner to enter into a contract for the sale of the assets and operations of its business and the calculated failure to pay for them.

While a breach of contract to purchase another's business may not be intrinsically anticompetitive, on analysis, there is no sound reason why the purposeful destruction of a competitor by the means of the intentional subversion of a contract to purchase the competitor's business cannot constitute a violation of Section 1 of the Sherman Act. *Brunswick* simply cannot be read, as the Courts below did, to introduce a subjective test of whether or not the means chosen, such as the calculated breach and total subversion of a contract, somehow sound or feel like an antitrust violation. What matters is the intent and effect of the conduct, not its nature.

Breaches or non-performance of contract can, of course, constitute an antitrust violation. *Cromar Co.* v. *Nuclear Materials & Equipment Corp.,* 543 F.2d 501 (3rd Cir. 1976); *Metal Window Service, Inc.* v. *Phoenix Construction Corp.,* 1977-2 Trade Cas. ¶61,653 (E.D.N.Y. 1977); *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp., supra,* 57 F.2d 96 (1st Cir.), *cert. denied,* 286 U.S. 552 (1932). That the respondents destroyed petitioner's business by using the subtle means of fraudulently entering into a contract to purchase petitioner's operations, calculatingly breaching said contract, and raising false and spurious claims against

petitioner to avoid paying for the business is no less a violation of Section 1 of the Sherman Act, if its purpose and effect are anticompetitive. In order to violate Section 1, respondents need not engage in obvious acts of destruction of a business nor choose means previously used by others and held to be violative of the antitrust laws. The mind of man is creative; improper acts may run the gamut of "gunfire and bullets . . . dynamite and the torch", *Coronado Coal Co.* v. *United Mine Workers of America*, 268 U.S. 295, 299 (1925), to the more creative and novel methods used by the respondents here. It is simply not possible to catalogue all the methods by which antitrust violations may be accomplished. *George R. Whitten Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547, 560 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *American Tobacco Co.* v. *United States, supra*, 147 F.2d 93, 107 (6th Cir. 1944), *aff'd*, 328 U.S. 781 (1946). To be effective, the antitrust laws cannot be straightjacketed and limited to cover only traditional means of anticompetitive conduct.

Clearly, petitioner here has alleged antitrust injury—*i.e.*, damages "directly attributable to the unlawful combination". *Story Parchment Co.* v. *Paterson Parchment Paper Co., supra*, 282 U.S. 555, 562 (1931). *See also, Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 702 (1962); *Perma Life Mufflers Inc.* v. *International Parts Corp.*, 392 U.S. 134, 143-44 (1968) (concurring opinion). For the purposes of Section 1 of the Sherman Act, injury caused to a plaintiff by the very means used to attain anticompetitive ends is "antitrust injury". *Y&H Investments, Ltd.* v. *Belvey Corp.*, 444 F. Supp. 1321 (W.D.N.C. 1978). Petitioner has alleged purposeful and actual harm to competition and injury flowing directly from the anti-

competitive means used. The respondents' acts caused petitioner injury in fact and the interest sought to be protected is clearly within the zone of interests to be protected by Section 1 of the Sherman Act. Such allegations state a claim for antitrust injury caused by violation of Section 1 of the Sherman Act.

Conclusion

The questions presented in this case involve the important issue of definition of "antitrust injury" for purposes of Section 1 of the Sherman Act which only this Court can resolve. Specifically, is it necessary to allege more than a violation of Section 1 and injury directly flowing as a result of the violation or of the means utilized to accomplish the violation? Does this Court's language in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), a damages action based upon the prophylactic measures of Section 7 of the Clayton Act, have any application to an action under Section 1 of the Sherman Act which requires actual harm? In addition, does *Brunswick*, a case concerning proof of injury after a trial, have any application to a motion to dismiss on the face of the pleadings, before the plaintiff has had an opportunity for discovery and a chance to prove "antitrust injury"? Finally, does *Brunswick* change settled law that a competitor directly injured by the very means used to effectuate a Section 1 violation has suffered "antitrust injury" even though it is no longer in the market when the anticompetitive effects are felt and even though the means used were novel and creative and may be otherwise actionable? It is respectfully urged that the need for further clarification of this Court's

decision in *Brunswick* in these respects is an important issue warranting this Court's full consideration. Accordingly, a writ of certiorari should issue to the Court of Appeals for the Sixth Circuit to review those aspects of the Court's decision discussed above.

Respectfully submitted,

ROBERT EHRENBARD
350 Park Avenue
New York, New York 10022
Counsel for Petitioner

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Opposition

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No. 81-218

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FEDDERS CORPORATION, FEDDERS INTERNATIONAL CORPORATION, AIRTEMP CORPORATION, AIRTEMP INTERNATIONAL CORPORATION and FEDDERS WORLD TRADE CORPORATION,

Petitioners,

vs.

CHRYSLER CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN SHERMAN
Attorney for Respondents
425 Park Avenue
New York, New York 10022
(212) 371-5400

Weisman, Celler, Spett,
Modlin & Wertheimer
Of Counsel

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STATEMENT OF FACTS

A. The Allegations of the Complaint

Chrysler alleges that the first claim for relief is based on defendants' alleged violation of Section 1 of the Sherman Act (15 U.S.C. §1) entitling Chrysler to maintain a private action for treble damages under Section 4 of the Clayton Act (15 U.S.C. §15).

Chrysler was engaged in the business of designing, manufacturing, marketing and servicing non-automotive air conditioning systems and products through its Airtemp Division (the "Division"). Fedders is also engaged in the design, manufacture, marketing, servicing and distribution of various air conditioning systems and products.

Chrysler, prior to its negotiations with Fedders, made various "efforts to sell the Division and the subsidiaries affiliated with the Division to others".

In accordance with Chrysler's pre-existing determination to sell its non-automotive air conditioning business, "[o]n February 23, 1976, Chrysler agreed to sell virtually all of the assets and operations of the Division, including the Foreign Subsidiaries to Fedders and on that date C-A-T Airtemp [Respondent Airtemp Corporation] took over these assets and operations, except for the Foreign Subsidiaries which were to be transferred and paid for at a later date".*

*"Foreign Subsidiaries" are referred to by Chrysler in the complaint as "various foreign subsidiaries ... [of the Division] which were variously engaged in the distribution and manufacture of air conditioning products".

Consistent with Chrysler's efforts to dispose of its non-automotive air conditioning business, Chrysler provided the customary covenant that for a period of five years it would not engage in that business, except with respect to the South African and Australian subsidiaries and except that the other foreign subsidiaries may continue to be owned and operated by Chrysler to the extent contemplated by the Agreement with respect to them.

The "antitrust" allegations of the first claim are nothing more than an impermissible attempt to convert into a federal treble damage action matters which are no more than an alleged breach of contract or claimed frauds relating to the Agreement. As the Petition states, the operative facts

said to be the basis for Chrysler's antitrust claim are Chrysler's allegations in various forms of a sale of its non-automotive air conditioning assets to Fedders and Fedders' alleged failure to pay for them (Petition at 5-6).

In its effort somehow to convert an alleged breach of contract claim into a treble damage antitrust action, the first claim for relief is replete with conclusory allegations that Chrysler was eliminated as a competitor in the sale of non-automotive air conditioners -- i.e., defendants' "purpose" was to "eliminate and destroy the Division as a competitor of defendants and as a competitive entity in the Market". But it is manifest from Chrysler's own allegations in the first claim, as

well as the Agreement, that Chrysler independently desired to withdraw from the non-automotive air conditioning market and prior to the Agreement and, indeed, prior to any discussions with Fedders, was engaged in efforts to sell its Division to others. Chrysler alleges as much in paragraph 28(a) of the complaint.*

In fact, however, by entering into the Agreement, Chrysler voluntarily withdrew from the alleged relevant market and by its own choice succeeded in eliminating itself as a competitive entity in that market. Chrysler would, of course, have preferred to

*Chrysler's description of its complaint in its Petition conspicuously ignores its allegation in paragraph 28(a) that "Chrysler abandoned its efforts to sell the Division and the subsidiaries affiliated with the Division to others".

have been paid more for the assets it sold to Fedders. But the question of whether or not Chrysler is entitled to the various amounts it claims for the assets it sold to Fedders is no more an antitrust issue than the question of whether or not Fedders in fact overpaid for the assets it received.

B. The Decisions Below

The District Court granted defendants' motion to dismiss the complaint because of its failure to allege any "antitrust injury" as required by this Court's decision in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) (A2).

On appeal, the Sixth Circuit affirmed most of this result.* In

*That portion of the Sixth Circuit's judgment which partially reversed the District Court is the subject of a Petition for Certiorari in No. 80-2222.

affirming, the Court first disagreed with Chrysler's contention that Brunswick was meant to apply only to actions charging violation of Section 7 of the Clayton Act (A7).

After harmonizing the standing requirement set forth in Brunswick, with the liberal rule set forth in Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975) (A7-9), the Court of Appeals held that Chrysler had failed to plead the existence of the requisite antitrust injury with respect to the domestic and most of the foreign operations of the Division (A9-10). Chrysler voluntarily withdrew from the non-automotive air conditioning market by contracting to sell virtually all of the Division assets (A9). The Court concluded that:

Even if a breakdown of competitive conditions in the market has indeed occurred, Chrysler's loss is not attributable to that change. Chrysler would have suffered an identical loss if the defendants had failed to make payments under the contract for reasons unrelated to the alleged antitrust violations. Cf. Brunswick, supra, at 487. Moreover, if the defendants had fulfilled their obligations as agreed, Chrysler would have no complaint, yet would still be divested of its assets and precluded from competing in the market. See A.D.M. Corp. v. Sigma Instruments, Inc., 628 F.2d 753 (1st Cir. 1980). Therefore, to the extent that Chrysler alleges damages resulting from its elimination from competition with the defendants through the Airtemp Division and the subsidiaries included in the contract for sale, it lacks the "essential connection between injury and the aims of the antitrust laws" necessary to establish standing. A.D.M. Corp., supra, at 754.

ARGUMENT

THE APPLICATION OF SETTLED LAW REQUIRED DISMISSAL OF CHRYSLER'S COMPLAINT

Chrysler strenuously argues in its Petition that the dismissal of most of its antitrust claim "raises important questions of federal law which should be settled by the Court without delay" (Petition at 7). To the contrary, however, the dismissal merely reflects the application of settled law as enunciated in Brunswick and other decisions to the allegations of Chrysler's complaint.

1. Brunswick Applies to Sherman Act Cases

Chrysler argues that the Brunswick decision applies only to actions charging violation of Section 7 of the Clayton Act (Petition at 9-11).

Nowhere in Brunswick is any such restriction expressed. The reasons why such a restriction would make no sense were succinctly explained by the Court of Appeals:

> We disagree with Chrysler's suggestion that the holding in Brunswick is limited to treble damage actions for violations of §7 of the Clayton Act. Although that decision was an "intermeshing" of §7's prohibitions with the §4 remedy, 429 U.S. at 486, it primarily addresses the boundaries of the treble damage section. The Supreme Court was concerned with bringing antitrust recovery in line with the purposes of the antitrust laws. Id. at 487. We see no reason why its holding should not be applicable where, as here, the statutory prohibition uon which a treble damage action is based is found in the Sherman Act.

2. Voluntary Withdrawal From the Relevant Market Cannot be the Basis of an Antitrust Violation

Chrysler argues that this case involves the question of whether

Brunswick sub silentio "overruled settled law that injury resulting from the means used to effectuate a violation of Section 1 of the Sherman Act, even though compensable under common law, constitutes "antitrust injury" (Petition at 12). Chrysler's argument is based on a misreading of the decisions of the courts below. In the present case, the "means" alleged in the complaint by which Chrysler ceased to compete in the non-automotive air conditioning market was its own voluntary decision to withdraw from that market, as effectuated by its voluntary sale of Airtemp division assets to Fedders. What the courts below held was that Chrysler, having voluntarily eliminated itself as a competitor, lacked "the 'essential

connection between injury and the aims of the antitrust laws' necessary to establish standing" (A10, quoting A.D.M. Corp. v. Sigma Instruments, Inc., 628 F.2d 753, 754 (1st Cir. 1980).

Chrysler's voluntary withdrawal totally undermines its argument that "[u]nder [the lower courts'] reading of Brunswick, a competitor totally destroyed by predatory pricing would have suffered no 'antitrust injury' because it was no longer in the market when the anticompetitive effects of the violation were felt" (Petition at 13). Nothing in the lower courts' decisions could possibly be read as having this effect. Cases such as Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S.

555 (1931), and Coronado Coal Co. v. United Mine Workers of America, 268 U.S. 295 (1925) (cited in the Petition at 12-13), which did not involve voluntary self-removal from the relevant market are therefore totally unaffected by the lower court holdings in the present case.

3. The Dismissal of Chrysler's Complaint Was Required by Brunswick and Did Not Reflect the Application of a "Subjective" Definition of "Antitrust Injury".

Chrysler argues that the courts below incorrectly read the Brunswick decision as requiring a "subjective" definition of antitrust injury (Petition at 14-17), i.e., "whether or not the means chosen [to eliminate a competitor] ... somehow sound or feel like an antitrust violation" (id. at

15). Actually, as we have seen, the lower courts simply held (A9-10) that Chrysler suffered no antitrust injury because its elimination as a competitor would have occurred whether or not "defendants had fulfilled their [contractual] obligations as agreed" (A10). Thus, Chrysler's alleged injuries bore no connection with the aims of the antitrust laws (id.).

This holding was required by the Brunswick decision and in no way reflects a subjective definition of "antitrust injury". Thus, the Brunswick definition of "antitrust injury" is as follows:

> "Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anti-

> competitive effect either of the violation or of anticompetitive acts made possible by the violation" (429 U.S. at 489; emphasis in original).

In Brunswick, the judgment for plaintiffs was reversed even though, for the purposes of the decision, it was assumed by the Supreme Court that defendants violated the antimerger provisions of Section 7 of the Clayton Act and also that the plaintiffs had in fact suffered injury as a result. But the injury to plaintiffs was held not to be compensable under the antitrust laws because it was not the "'type that the statute was intended to forestall'" (429 U.S. at 487-88; citation omitted). Cf. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

Professor Milton Handler, a nationally recognized antitrust scholar,

noted in a recent article that the Supreme Court in Brunswick held that a private treble damage plaintiff "must prove something more than injury causally linked to defendant's illegality". Handler, Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term-1977, 77 Colum. L. Rev. 979, 989 (Nov. 1977) (hereinafter cited as "Handler"). Brunswick held that "[t]here must be an intimate relationship between the circumstances which make the wrongdoer's conduct unlawful and the resulting harm which the plaintiff suffers" (Handler at 990). In Brunswick, the injury for which plaintiff sought redress reflected neither that which made the challenged conduct unlawful nor the anticompetitive

effects of acts made possible by the illegal conduct. The fact that there may be arguably be a proximate causal relationship between an antitrust infraction and the harm which the plaintiff has suffered is insufficient unless that harm rises to the level of an antitrust injury.

In the present case, even if one could assume, contrary to the fact, that Fedders' acquisition of Chrysler's non-automotive air conditioning assets somehow adversely affected competition in any relevant market and that Chrysler was in fact injured by Fedders' alleged failure to pay fully for the assets sold and by Fedders' alleged other breaches of obligations under the Agreement, such injury is not an "antitrust injury" because it

cannot be said to be in any way reflective of or related to "that which makes defendants' acts unlawful" under the antitrust laws. The only possible anticompetitive effect of Fedders' acquisition of the assets of the Division would be in the market after the acquisition. The gravamen of Chrysler's first claim, however, relates to its alleged failure to be paid fully for the assets it sold to Fedders and the services it allegedly rendered to Fedders.* Chrysler's claim is unrelated to the manner in which competition in the market was allegedly injured by the acquisition.

*As we have shown, Chrysler's complaint concedes that (i) Chrysler had a pre-existing intention, independent of any alleged conduct by defendants, to withdraw from the market, and (ii) it sold its non-automotive air conditioning business to Fedders to accomplish that intention.

Thus, Chrysler cannot be said to have suffered any antitrust injury, as Brunswick holds is required by Section 4 of the Clayton Act in order to maintain this action. Accord, e.g., John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 498-500 (9th Cir. 1977); Murphy Tugboat Co. v. Crowley, [1978-2] Trade Reg. Rep. (CCH) ¶61,984 at 74,206-08 (E.D. Mich. April 3, 1978); NAACP v. New York Clearing House Association, 431 F. Supp. 405, 411 (S.D.N.Y. 1977); Person v. New York Post Corp., 427 F. Supp. 1297, 1308 (E.D.N.Y. 1977); Handler, supra at 989-97; cf. Areeda, Antitrust Violations Without Damage Recoveries, 89 Harv. L. Rev. 1127, 1130-36 (1976).

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN B. SHERMAN
Attorney for Respondents

Weisman, Celler, Spett,
Modlin & Wertheimer

Of Counsel